86-719

No. .....

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1986

MARRELL WRIGHT EDWARDS,
ADMINISTRATRIX, CTA, THE ESTATE OF
HENRY THOMAS EDWARDS, DECEASED,

Appellant,

vs.

JANIE LEE (STILES) EDWARDS,

Appellee.

ON APPEAL FROM THE TENNESSEE SUPREME COURT

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED FOR APPEAL

DOES THE ACTION OF A STATE COURT IN ORDERING ALIMONY PAYMENTS TO BE MADE FROM THE PROCEEDS OF AN INDIVIDUAL RETIREMENT ACCOUNT ESTABLISHED PURSUANT TO THE EMPLOYEE RETIREMENT INCOME SECURITY ACT VIOLATE THE SUPREMACY CLAUSE OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA?

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JURISDICTIONAL STATEMENT

Opinion Below

This appeal is from an Opinion by the Tennessee Supreme Court which was filed on June 16, 1986, and bears Appeal No. 85-120-I. A Petition to Rehear the question presented was filed, but denied on July 28, 1985. Copies of the Opinion and Opinion on Petition to Rehear are set forth in the Appendix, *infra,* pp. 13-28.

Jurisdiction

a. Nature of the Proceeding

The Appellant, Marrell Wright Edwards, is the Administratrix of the Estate of her deceased husband, Henry Thomas Edwards. The marriage between Mr. Edwards and the Appellant was his second. His first marriage was to the Appellee, Janie Lee (Stiles) Edwards.

Mr. Edwards and the Appellee were divorced on October 30, 1974, in the Circuit Court for Davidson County, Tennessee. The divorce decree contained a property settlement agreement between the parties which provided for the payment of alimony. Under the terms of the divorce decree, Mr. Edwards was obligated to pay alimony to the Appellee until she died or remarried, whichever occurred first.

Mr. Edwards died on June 9, 1983, and under Tennessee law, his estate became liable for alimony payments to the Appellee. However, the size of his estate was not sufficient to continue the *in futuro* alimony payments.

Upon realizing the paucity of Mr. Edwards' estate, both parties sought judicial relief. The Appellant sought

to terminate the alimony payments, and the Appellee sought to continue them. The Appellee also initiated action to have certain assets which Mr. Edwards and the Appellant jointly owned to be considered as fraudulent conveyances including the Individual Retirement Account which Mr. Edwards maintained and which passed to the Appellant at his death.

The determination by the Tennessee Supreme Court that the receipt by the Appellant of the proceeds of the Individual Retirement Account as constituting a fraudulent conveyance has precipitated this appeal.

The notice of appeal to this Honorable Court was filed on August 1, 1986, with the Clerk of the Tennessee Supreme Court, which is set forth in the Appendix, *infra*, pp. 29-30.

This Honorable Court's attention is respectfully called to the pendency of another case from Tennessee, *Rose v. Rose,* No. 85-1206, wherein this Honorable Court noted probable jurisdiction on the question of whether a state may properly order child support payments from veteran's disability benefits.

b. Statute Conferring Jurisdiction

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(1) and (2), this being an appeal to determine whether the seizure of Individual Retirement Account funds to satisfy an alimony obligation by the Tennessee Supreme Court contrary to the Employee Retirement Income Security Act is repugnant to the Supremacy Clause of the Constitution of the United States of America.

c. Laws Which the Case Involves

1. Article VI, Clause 2, *Constitution of the United States of America*:

> "This Constitution, and the Laws of the United States shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judge of every State shall be bound thereby. Any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

2. Federal Statutes

a. 29 U.S.C. § 1056(d)(1):

> "Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated."

b. 26 U.S.C. § 408(a)(4):

> "The interest of an individual in the balance of his account is non-forfeitable."

c. 29 U.S.C. § 1144(a):

> 'ERISA' "shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan."

d. Statement of the Case

The facts of this case are taken from the answers to interrogatories, affidavits and documents contained in the record filed in the Circuit Court for Davidson County, Tennessee. There the trial court determined that the alimony which the Appellee had been receiving from Mr. Edwards should terminate because the trial court found his death was a sufficient change in circumstances to justify the termination of the alimony and that the assets which Mr. Edwards and the Appellant owned jointly were not held by

the Appellant after Mr. Edwards' death in violation of the Uniform Fraudulent Conveyance Act, Tenn. Code Ann. §§ 66-3-301 to -314.

The Appellee then appealed to the Tennessee Court of Appeals which held that Mr. Edwards' obligation to pay alimony to the Appellee was not extinguished by his death and that certain bank accounts which were owned jointly by the Appellee and Mr. Edwards were fraudulent conveyances. The Tennessee Court of Appeals also commuted the alimony obligation by the Appellant to the Appellee to a lump sum.

Whereupon, the Appellant petitioned the Tennessee Supreme Court for permission to appeal and permission was granted.

The Tennessee Supreme Court agreed with the Court of Appeals that the alimony obligation should not be terminated at Mr. Edwards' death, but reversed the decision of the lower court commuting the alimony to a lump sum. The Tennessee Supreme Court distinguished between joint bank accounts, which it held not to be fraudulent conveyances, and Mr. Edwards' Individual Retirement Account, which it found to be a fraudulent conveyance.

The Tennessee Supreme Court held that the proceeds of an Individual Retirement Account cannot be shielded from the claims of alimony and child support notwithstanding the provisions of 29 U.S.C. § 1056(d)(1), which provides that there can be no alienation or assignment of benefits, and 29 U.S.C. § 1144(a), which provides that all state laws relating to employment plans covered by ERISA are superseded.

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REASONS FOR PLENARY CONSIDERATION

This Honorable Court should note probable jurisdiction because state court orders seizing the balances of IRAs directly impinge upon and damage major federal interests.

Congress has expressly provided that all state laws relating to employee benefit plans established under the Employee Retirement Income Security Act (ERISA)[1] are preempted thereby,[2] and that all pension plans established under ERISA must provide that their benefits may not be assigned or alienated.[3]

Moreover, the expansion of ERISA by the creation of Individual Retirement Accounts (IRAs)[4] carries forward this Congressional intent by requiring that the interest of the settlor in an IRA be non-forfeitable.[5] Therefore, the Tennessee Supreme Court is without jurisdiction to order the funds in a qualified Individual Retirement Account disbursed to a non-beneficiary, except in a manner prescribed by Congress.

As this Court held in *In Re Burrus*,[6] domestic relations laws should generally be left to the states. Even when it is alleged that state family law conflicts with a federal statute, this Court has limited its review under the

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[1] 29 U.S.C. § 1001, *et seq.*

[2] 29 U.S.C. § 1144(a).

[3] 29 U.S.C. § 1056(d).

[4] 26 U.S.C. § 408.

[5] 26 U.S.C. § 408(a)(4).

[6] 136 U.S. 586 (1890).

Supremacy Clause to a determination of whether Congress positively required by direct enactment that state law be preempted.[7] Yet where state family law does major damage to a clear and substantial federal interest, the Supremacy Clause will demand that state law be overridden. In *Hisquierdo v. Hisquierdo*,[8] this Honorable Court ruled that the anti-attachment clause of the Railroad Retirement Act of 1974[9] preempted a state court order awarding an interest in retirement benefits as a part of a property settlement in a divorce. States "must defer to federal statutory schemes insofar as the terms of federal law require."[10]

In *Shaw v. Delta Air Lines, Inc.*,[11] this Court held that 29 U.S.C. 1144(a) (providing for preemption of state laws to the extent that they "relate to" any employee benefit plan) had a very broad preemptive reach, and a state law "relates to" employee benefit plans if it has a "connection with or reference to the plan."[12] If this language were given an alternative interpretation, that Congress intended preemption only of state laws directly intended to affect employee benefit plans, the Court ruled that to do so would ignore the legislative history of ERISA, in which Congress deleted a proposed preemption clause which would have been "applicable only to state laws relating

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[7]*Wetmore v. Markoe*, 196 U.S. 68 (1904).

[8]439 U.S. 572 (1979).

[9]45 U.S.C. § 231.

[10]*Hisquierdo*, 439 U.S. at 583.

[11]463 U.S. 85 (1983).

[12]*Id.* at 97.

to the specific subjects covered by ERISA."[13] The pre-emptive scope of 29 U.S.C. 1144(a) is "as broad as its language."[14]

Thus the intrusion of state courts into this federally preempted area should be scrutinized carefully. The intention of Congress in passing ERISA was to insure that "if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he actually receives it."[15] With this intention in mind, it is easy to apply the test set out in *Hisquierdo*:[16] "The pertinent questions are whether the right as asserted conflicts with the express terms of federal law and whether its consequences sufficiently injure the objectives of the federal program to require non-recognition." The court applied this test in *Hisquierdo* in considering whether the federal statute[17] barring assignment, garnishment or attachment of railroad retirement benefits pre-empted a state court order awarding an interest in those benefits as a part of the property settlement in a divorce proceeding. The Court concluded that the Congress in allocating a specific sum for railroad retirement benefits has provided the precise amount it considers appropriate for the employee's retirement—an amount that was designed to encourage an eligible employee to retire. Reducing that amount by as-

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[13] *Id.* at 98.

[14] *Id.*

[15] *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 375 (1980).

[16] 439 U.S. at 583.

[17] 46 U.S.C. § 231.

signing part of it to the divorced spouse in a property settlement agreement reduces the incentive to retire and thus frustrates the Congressional objective.[18]

As this Honorable Court has ruled, it does not matter that this seizure of assets is an indirect, rather than direct, intrusion on the federally preempted area; the provisions of ERISA are clear that indirect as well as direct intrusions "may encroach upon the area of exclusive federal concern."[19] Yet, a number of court decisions support the proposition that state court orders enforcing family support rights against retirement plans do not violate ERISA.[20] These decisions were neutralized in 1984 Congress amended ERISA to provide that a pension plan could be invaded but only pursuant to a qualified domestic relations order. Their amendment states that such an order is qualified only: if it clearly specifies the amount or percentage of benefits to be paid, or the manner in which the amount or percentage is to be determined; the number of payments or period to which the order applies; and if the order does not require the plan to provide any type or form of benefit or any option, not otherwise provided under the plan.[21] Clearly, Mr. Edwards' divorce decree does not

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[18]*Hisquierdo v. Hisquierdo*, 439 U.S. at 585.

[19]*Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 525 (1981).

[20]*See, e.g., Savings and Profit Sharing Fund of Sears Employees v. Gago*, 717 F.2d 1038 (7th Cir. 1983); *Bowen v. Bowen*, 715 F.2d 559 (11th Cir. 1983); *Carpenters Pension Trust for Southern California v. Kronschnabel*, 632 F.2d 745 (9th Cir. 1980); *Western Electric Co. v. Traphagen*, 166 N.J. Super. 418, 400 A.2d 66 (App. Div. 1979); *Commonwealth ex rel. Magrini v. Magrini*, 263 Pa. Super. 366, 398 A.2d 179 (1979).

[21]29 U.S.C. § 1056(d)(3).

meet this statutory criteria. The Tennessee Supreme Court did not even attempt to comply with the statute.

The Tennessee Supreme Court, in reaching its conclusion that IRA funds were available for alimony purposes despite the specific preemption of plan funds in 29 U.S.C. § 1144, relied partly on language contained in the opinion of the Superior Court of New Jersey, Chancery Division, in *Mallory v. Mallory*,[22] which distinguished IRAs from other ERISA pension plans in that the "only funds present in the IRA plan are those of the settlor. The fact that the *corpus* may be required to be turned over will not affect the funds of strangers but only those of the individual covered by the plan . . . other interests are non-existent."[23]

In the instant case it is obvious that the interests of the second Mrs. Edwards (hardly "non-existent") are directly affected and forcefully damaged by the designation of the IRA funds upon which she was depending as assets available for the payment of potentially unlimited alimony to the appellee. Major damage to clear and substantial federal interests is demonstrated when ERISA as now amended can be emasculated at will by state courts, without regard to the intent of Congress that the funds of these plans be available for settlors and their beneficiaries or paid out pursuant to a qualified domestic relations order. In the instant case, the intended and proper beneficiary of the IRA has been pushed aside as the result of a state court's determination that a non-beneficiary has first call

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[22]179 N.J. Super. 556, 432 A.2d 950 (1981).

[23]*Id.* at 564-5, 432 A.2d at 955.

on the account's assets. Thus the assertion of the Tennessee Supreme Court that, somehow, the transfer of the IRA assets to the appellant upon the death of her husband was a fraudulent conveyance, is "supported by federal authorities" is wholly without foundation.

The late Mr. Edwards put his faith in the inviolability of the Individual Retirement Account by making provision for his and his second wife's old age, which inviolability his untimely death should in no way diminish. The damage to federal interests in allowing a state to seize a widow's retirement fund is obvious. The IRA was intended to provide extra financial security for Americans in their retirement years, and the intent of Congress to insure the certainty of these benefits is demonstrated by making an individual's interest in IRA accounts nonforfeitable.[24] If the corpus of an Individual Retirement Account can be invaded in order to meet open-ended alimony obligations, then there is no certainty whatever in the amount at the disposal of the owner, or, as in this case, his widow. It is possible in some circumstances that the entire account would be drained away, leaving nothing for the intended beneficiary. Even in a less severe situation, the Congressional intent of a secure retirement fund for ordinary Americans is totally frustrated by the uncertainty resulting from a continual monthly surcharge on the IRA, with no end in sight.

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[24] 26 U.S.C. § 408(a)(4).

CONCLUSION

For the foregoing reasons, this Honorable Court should note probable jurisdiction and hear this matter on the merits, or in the alternative, and in the event that this Honorable Court does not consider appeal the proper mode of review, the Appellant prays that this appeal be regarded and acted upon as a petition for a writ of certiorari pursuant to 28 U.S.C. § 1257(3).

Respectfully submitted,

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APPENDIX

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

MARRELL WRIGHT EDWARDS, ADMINISTRATRIX, C.T.A. THE ESTATE OF HENRY THOMAS EDWARDS, DECEASED,

Appellant

vs.

JANIE LEE (STILES) EDWARDS,

Appellee

DAVIDSON LAW

APPEAL NO. 85-20-I

Honorable Walter C. Kurtz, Judge

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O P I N I O N

(Filed June 16, 1986)

COURT OF APPEALS REVERSED;
REMANDED TO TRIAL COURT
FOR FURTHER PROCEEDINGS CORNELIUS, S.J.

Marrell Wright Edwards, the administratrix of the estate of Henry Thomas Edwards, has been granted permission to appeal from an opinion of the Court of Appeals. The administratrix presents one issue: are bank accounts owned by her and her late husband as tenants by the entirety subject to the alimony claim of the ex-spouse as a creditor?

The issue evolved from the divorce proceeding between Henry Edwards and his first wife, Janie Edwards. Upon Henry Edwards' death the proceedings were revived by substitution of his administratrix, Marrell Edwards, his widow, as a party to the lawsuit. No issue is raised by either party as to the timely filing of a claim against the estate. *See* T.C.A. § 30-2-307. The presumption is that the notice of claim was timely filed.

For reasons hereafter set forth, the opinion of the Court of Appeals is reversed and this cause is remanded to the trial court with instructions.

THE DIVORCE

After thirty-seven years of marriage, Henry Edwards sued Janie Edwards for a divorce. His petition was filed on November 23, 1973 and on December 4, 1973 Janie Edwards filed a counter complaint. On October 30, 1974, the Circuit Court for Davidson County entered a decree which granted Janie Edwards an absolute divorce. The decree contained a property settlement agreement between the parties. The decree, per the agreement, made the following provision for alimony:

> 8. It is further agreed between the parties that the Wife shall receive from the Husband, as continuing alimony, $400.00 per month and that said payment shall be made by the Husband on a monthly basis, and shall be paid on the first day of every month after the entry of the final divorce decree herein, and said payment shall continue on the first of every month for as long as the Wife lives or until she remarries, and, in that event, the alimony payments shall cease. Provided that the parties further agree that the matter of alimony remains before the Court for an equitable

amount to be set in the event changes in circumstances occur.

Additionally, Janie Edwards was awarded their residence in Davidson County and Henry Edwards was ordered to pay off the mortgage within a specified period. He was awarded their cottage in Wilson County, including the personal property pertaining to its use. He retained his retirement benefits which he had accumulated in his employment, and his stock in the Tennessee Valley Electric Supply Company and Southern Sales Company.

POST DIVORCE EVENTS

On October 20, 1974, Henry Edwards married Marrell Edwards who, per interrogatories. had a net worth of one hundred twenty-five thousand ($125,000.00) dollars. She co-signed Henry Edwards' note that he might pay the mortgage on Janie Edwards' home. In turn, she was deeded a one-half undivided interest in the Wilson County property.

In 1980, Henry Edwards retired. He petitioned the Circuit Court to reduce his alimony payments. Following a hearing, the monthly payments were reduced to three hundred ($300.00) dollars. This decree provided that: "either party retains the right to come into court upon a substantial financial change of circumstances in order to modify the decree of alimony as heretofore ordered by the court."

Henry Edwards died on June 9, 1983. He was current in his alimony payments. His widow, Marrell Edwards, was appointed administratrix. C.T.A. of his estate.

These proceedings are pending in the Probate Court of Williamson County.

Following the substitution of Marrell Edwards, as administratrix, and the revival of this divorce action, Janie Edwards petitioned for an order: (1) requiring the estate to pay her alimony since June, 1983; (2) increasing the amount of the monthly alimony payments to four hundred ($400.00) dollars; and (3) declaring certain conveyances between Henry Edwards and his second wife to be fraudulent conveyances in violation of T.C.A. § 66-3-301 through § 66-3-314. The administratrix petitioned the trial court to terminate the obligation to pay alimony by reason of the death of Henry Edwards.

THE RULING OF THE CIRCUIT COURT

The trial court, relying upon the answers to the interrogatories, affidavits and documents contained in the record, undertook to finalize this litigation. In an order entered February 14, 1984, the trial court determined: (1) Janie Edwards was entitled to alimony in the amount of three hundred ($300.00) dollars a month from July 1, 1983 through January 31, 1985; (2) there was a sufficient change in circumstances to justify the termination of alimony after January 31, 1985; and (3) Henry Edwards did not transfer any of his assets in violation of the Uniform Fraudulent Conveyance Act, T.C.A. § 66-3-301 through § 66-3-314. Janie Edwards appealed this decision to the Court of Appeals.

OPINION OF COURT OF APPEALS

The Court of Appeals determined: (1) that Henry Edwards' obligation to pay alimony to Janie Edwards was

not extinguished by his death; (2) certain bank accounts held by Henry Edwards and his second wife violated T.C.A. § 66-3-305 and were, by the terms of the statute, fraudulently conveyed when these funds became the sole property of Marrell Edwards upon the death of Henry Edwards; (3) T.C.A. § 45-2-703(a), as amended by the Tennessee Legislature, effective April 14, 1983, provided Janie Edwards with the means of gaining access to the bank accounts which had been previously held by Henry and Marrell Edwards; and (4) awarded Janie Edwards twenty-one hundred ($2,100.00) dollars as past due alimony, to the date of its opinion, plus thirty-six thousand ($36,000.00) dollars as alimony *in solido* in lieu of the alimony *in futuro* which had been granted under the decree of 1974 and as modified in 1980. Marrell Edwards, as administratrix, petitioned this Court for permission to appeal and permission was granted.

THE FINDINGS OF THIS COURT

I

Both the trial court and the Court of Appeals concluded that Janie Edwards was entitled, as a creditor, to the continuation of her monthly alimony payments from the estate of Henry Edwards. The Court of Appeals noted that both sides conceded this issue. We are not directed to such a concession in the record but accept the fact as correct since such an issue has not been presented in this appeal. This finding is in keeping with this Court's holding in *Smith v. Phelps*, 218 Tenn. 369, 403 S.W.2d 747, 749 (1966). *See also* T.C.A. § 36-5-101(a)(1)(2); and the teachings of *In Re: Kerby's Estate*, 49 Tenn.App. 329, 354 S.W.2d 814 (1961). To the extent that the finding of fact

of the trial court and the Court of Appeals concur, they shall be conclusive upon this Court if there be any evidence to support them. *City of Columbia v. C.F.W. Construction Co.*, 557 S.W.2d 734 (Tenn. 1977); T.C.A. § 27-1-113. We, therefore, accept the finding that the provision "as long as the wife lives or until she remarries" was intended to create a binding obligation on Henry Edwards' estate. His death was not one of the required eventualities for the cessation of the payments. *See Smith v. Phelps*, supra; 24 Am.Jur.2d, Divorce and Separation, Section 911 (1966).

With the above principles in mind, we reject the trial court's finding that Henry Edwards' death was a change of circumstances requiring the termination of the monthly alimony payments some nineteen months after his death. The original settlement agreement, as well as the modifying decree, addressed only the death or remarriage of Janie Edwards as an event that would terminate the payments.

The Court of Appeals concluded that while Henry Edwards' death had a direct effect on his estate's ability to pay alimony, it had no effect upon Janie Edwards' need for continuing support. Prior to Henry Edwards' death, her annual income was thirty-six hundred ($3,600.00) dollars in alimony payments and thirteen hundred thirteen ($1,313.00) dollars interest from funds she received in the 1974 settlement. The Court of Appeals found that this 70-year-old lady was in need of continuing sustenance. There is no contradictory evidence in this record. As to this we concur.

However, the Court of Appeals conjectured that Janie Edwards' continued receipt of alimony payment would be

a source of discomfort and friction between the parties. Relying on decisions from two sister states, the Court of Appeals chose to change the alimony award in futuro to alimony in solido. It found Janie Edwards' life expectancy to be approximately 13 years and at the rate of $3,600 per year she would receive a total of forty-six thousand eight hundred ($46,800.00) dollars from Henry Edwards' estate. It determined that the present value of such an award, at ten per cent interest would approximate thirty-six thousand ($36,000.00) dollars. Thus, the Court of Appeals modified the trial court's original award to Janie Edwards to provide that she be paid thirty-eight thousand one hundred ($38,100.00) dollars from the funds remaining in Henry Edwards' separate estate and from the funds remaining in Henry Edwards' bank accounts at the time of his death. The transformation of this alimony obligation from one in futuro to one in solido was error.

Historically, alimony in gross (in solido) has been preferred to periodic (in futuro) alimony in cases of divorce from the bonds of matrimony. But, by statute and case law, alimony in futuro has gained approval in Tennessee. T.C.A. § 36-5-101(a)(1) and (2). *Also see Buchholtz v. Buchholtz*, 175 Tenn. 87, 132 S.W.2d 208, 209 (1939). Decrees awarding alimony in futuro are valid and enforceable in Tennessee.

Alimony *in solido* becomes final when the decree becomes final. *Spalding v. Spalding*, 597 S.W.2d 739 (1980). Alimony *in futuro* remains in the trial court's control; and, on application of either party, the court may decree an increase or decrease of such allowance on cause being shown. T.C.A. § 36-5-101(a)(1). The inequity of the Court of

Appeals' remedy is that after such a judgment became final, Janie Edwards would be free to remarry or providence decreeing, her next of kin could inherit an undeserved sum. Therefore, we hold that Janie Edwards is entitled to claim against the estate of Henry Edwards her past due alimony payments of three hundred ($300.00) dollars per month plus statutory interest. The estate will be obligated to continue such payments until she remarries, dies or the amount is increased or decreased for financial cause.

II

The administratrix, Marrell Edwards, questions whether bank accounts owned by a married couple as tenants by the entirety may be subjected to the alimony claim of an ex-spouse creditor, thereby nullifying such form of ownership. This question stems from the 1983 amendment to T.C.A. § 45-2-703 relative to bank deposits in two or more names. The amendment became effective April 14, 1983, prior to Henry Edwards' death in June 1983.

Prior to the 1983 amendment, T.C.A. § 45-2-703 read:

> When a deposit has been made or shall hereafter be made, in any bank in the names of two (2) or more persons, payable to either, or survivor, such deposit, or any part thereof, or any interest or dividend thereon, may be paid to either of said persons, whether the others be living or not; and the receipt or acquittance of such person so paid shall be a valid and sufficient release and discharge to the bank for any payment so made.

The 1983 legislature added a second sentence to section (a) which reads:

> Any balance so created shall be subject to assignment by, or the claim of any creditor of, either depositor,

> as if such depositor were the sole owner of the funds; provided, however, that if such creditor realizes its claim, by garnishment, set off, or otherwise, any other depositor may, by appropriate action against the creditor, establish such rights as that depositor may have in the funds.

The limited legislative history indicates that the amendment was a housekeeping response within the commercial banking statutes following this Court's opinion in *Griffin v. Prince*, 632 S.W.2d 532 (Tenn. 1982).

T.C.A. § 45-2-703 is a part of this state's commercial banking code. As pointed out in *Griffin*, this statute does not indicate a legislative intent to abolish any form of bank deposit, especially that of tenancy by the entirety. In fact the 1983 amendment explicitly preserved to "any other" depositor the right to establish, "by appropriate action", as against the third party, such rights as that depositor may have in the funds.

We conclude that no substantive change has been made in T.C.A. § 45-2-703 relative to bank accounts created jointly by husband and wife. *Griffin v. Prince*, supra, was not repudiated by the 1983 amendment to T.C.A. § 45-2-703. Procedurally, the amendment relieves the depository bank of responsibility to resist a third party's claim. The burden of establishing the status of the deposit, as one of tenancy by the entirety, has shifted from the bank to the "other" depositor.

III

Also presented in this appeal is Janie Edwards' insistence that Henry and Marrell Edwards created certain bank accounts for the purpose of placing his assets beyond

the reach of her claim for alimony. These accounts, therefore, were fraudulent conveyances in violation of Tennessee's Uniform Fraudulent Conveyance Act. T.C.A. § 66-3-301 et seq.

The trial court made a finding, on a very limited record, that Henry Edwards did not transfer any of his assets in violation of T.C.A. § 66-3-301 et seq. The Court of Appeals agreed in part and differed in part.

The Court of Appeals reasoned that neither the sale of the TVESCO stock in 1980, the sale of the Wilson County cottage in 1981, nor Mrs. Edwards' receipt of the IRA account in 1983 were fraudulent conveyances within the meaning of T.C.A. § 66-3-305. On the other hand, the Court of Appeals found that the passage of the funds in four joint bank accounts, totaling sixty-seven thousand, five hundred sixty-five ($67,565.00) dollars, to Marrell Edwards upon her husband's death could be set aside if the claims of the creditors are defeated.

We concur only in the finding that neither the stock or cottage sales were fraudulent by the terms of T.C.A. § 66-3-305. The IRA account will be considered later in this opinion.

There is evidence in this record which supports, factually, the trial court's finding that the four bank accounts[1] were not fraudulently conveyed. There is certainly no evidence in the record which contradicts Marrell

---

[1](1) First American National Bank, thirty-seven thousand, five hundred ($37,500.00) dollars; (2) Third National Bank, twenty thousand ($20,000.00) dollars; (3) Fidelity Federal Savings and Loan Association, five thousand ($5,000.00) dollars; and (4) First Bankers of Vero Beach, Florida, five thousand ($5,000.00) dollars.

Edwards' answers to the interrogatories. As joint accounts created by a husband and wife, as a tenancy by the entirety, these accounts are controlled by this court's holding in *Covington v. Murray,* 220 Tenn. 265, 416 S.W.2d 761 (1967). These accounts were not subject to the Uniform Fraudulent Conveyance Act; for it is well settled in this state that the words of a conveyance or legal instrument, which would make two other persons joint tenants under the common law, or tenants in common under T.C.A. § 66-1-107, will create tenancy by the entirety in a husband and wife. *Griffin v. Prince,* supra at 535[6]. *Also see First American National Bank v. Evans,* 220 Tenn. 393, 398, 417 S.W.2d 778 (1967), holding that a tenancy by the entirety may be created in this state in personal property without regard to the source of the property so held; and there is a presumption that they take by the entirety.

We reverse that part of the Court of Appeals' opinion that found the above described conveyance of bank accounts could be set aside if the claims of the creditors are defeated. The Court of Appeals obviously predicated its opinion on an erroneous application of T.C.A. § 45-2-703, as amended, to this Court's holding in *Griffin v. Prince,* supra.

IV

The final item for consideration is Henry Edwards' individual retirement account. The trial court's order of February 14, 1984 did not specifically mention this account. The fifth item in the order recites only that defendant did not transfer any assets in violation of T.C.A. § 66-3-301 through § 66-3-314. The Court of Appeals considered jointly the sale of the TVESCO stock, the Wilson County

cottage and the IRA account. It found that Marrell Edwards had received these proceeds without violation of the fraudulent conveyance act. We agree as to the stock and cottage sales. *See First American National Bank v. Evans*, supra. The IRA presents a much more complex problem than has been addressed.

The United States Congress established IRA accounts as part of the comprehensive Employee Retirement Income Security Act (ERISA) which provides that there will be no alienation or assignment of benefits, 29 USCA Section 1056(d)(1). Federal and state courts alike have confronted the problem with respect to benefits. The United States Court of Appeals for the Second Circuit, held in *Cody v. Riecker,* 594 F.2d 314 (2nd Cir. 1979), that enforcement of family support orders may be by garnishments of benefits regulated by ERISA. Indeed, an overall congressional intent not to interfere with the state's power to enforce family support obligation may be gleaned from judicial interpretation of exemption provisions in other federal statutes. *See Cartledge v. Miller,* 457 F. Supp. 1146, 1155 (S.D.N.Y. 1978). The case of *American Telephone and Telegraph Co. v. Merry,* 592 F.2d 118 (2nd Cir. 1979), also carved out an implied exception in furtherance of Congress' concern in ERISA legislation for the well being of employees and their dependents, as follows:

> "We reject appellant's proffered statutory construction and believe the more reasonable interpretation to be that a garnishment order used to satisfy court ordered family support payments is impliedly excepted from preempted state law relating 'to any employee benefits plan' . . . . [at 121]."

Congress expanded the ERISA legislation by establishing the individual retirement account. *See* 26 USCA, Section 408(a) and (b), Internal Revenue Code. Subsection (a) authorizes the individual retirement account, while (b) provides the individual retirement annuity. Under (a) the account is placed with a trustee bank for the exclusive benefit of the individual, or his beneficiaries. An annuity under (b) is issued by a qualified insurance company. From the exhibits in this record, Edwards' 1040 tax forms, it is clear that we are considering an IRA account as authorized under 408(a).

In *Mallory v. Mallory,* 179 N.J. Super 556, 432 A.2d 950 (1981), we find the following observation: "The IRA can also be distinguished from most other ERISA pension plans in one further respect. The only funds present in the IRA plan are those of the settlor. The fact that the *corpus* may be required to be turned over will not affect the funds of strangers but only those of the individual covered by the plan."

In response to interrogatories, Marrell Edwards announced that she became the beneficiary of this account upon the death of her husband. Janie Edwards has consistently maintained that the transfer of this fund to Marrell Edwards violated T.C.A. § 66-3-305 in that it prevents the estate from being able to meet its obligation for the payment of the monthly alimony until her death or remarriage. We agree. Such an insistence, while not argued before the Court of Appeals in this light, is supported, in reference to alimony and child support, by the federal authorities. See comments as to Social Security Act and Railroad Retirement Act in *Hisquierdo v. Hisquierdo,* 439 U.S. 572, 99 S.Ct. 802, 59 L.Ed.2d 1 (1979).

The individual retirement account, established by authority of 408(a), has been considered many times by the federal bankruptcy courts. In *In re Gefen*, 35 B.R. 368 (Bkrtcy. S.D. Fla. 1984) we find the following:

> As previously stated, both of the I.R.A. accounts created by the debtor were established pursuant to subsection (a) of § 408 and were "individual retirement accounts" rather than "individual retirement annuities" as contemplated by subsection (b) of § 408.
>
> [3] Based upon the foregoing, the Court finds that "individual retirement accounts", created in accordance with 26 U.S.C. § 408(a), and held in the form of funds on deposit in a bank account under the complete and unfettered control of the debtor are not "annuity contracts issued to citizens or residents of the state, upon whatever form," and are not unavailable to satisfy the claims of judgment creditors pursuant to Fla. Stat. § 222.14. Hence, the Court is not precluded from reaching the issue of the legal effect of the debtors' allegedly fraudulent transfer of funds from an individual retirement account to an individual retirement annuity. Other bankruptcy courts which have considered whether I.R.A. accounts are exempt under the Bankruptcy Code have reached a similar result. *In re Talbert*, 15 B.R. 536 (Bkrtcy.W.D.La. 1981); *In re Howerton*, 21 B.R. 621 (N.D. Tex. 1982); *In re Lowe*, 25 B.R. 86 (Bkrtcy.D.S.C. 1982).

There is authority that the proceeds of an IRA constitutes a "special deposit" but this pertains to the relationship between the trustee bank and the depositor of the IRA account. *First National Bank, etc. v. Estate of Philp*, 436 N.E.2d 15 (Ill.App. 1982).

T.C.A. § 26-2-112 establishes the exemptions rights for citizens of Tennessee pursuant to Section 522(b)(1), Public Law 95-598 known as the Bankruptcy Reform Act of 1978, Title 11 USC, Section 522(b)(1). Our statute is com-

parable to the Florida statute referred to in *In re Gefen,* supra. In support of this observation is *In re Peeler,* 37 B.R. 517 (Bkrtcy.M.D.Tenn. 1984), holding the debtor's IRA did not qualify as an exemptable annuity under T.C.A. § 26-2-111(1)(D).

This Court has examined T.C.A. § 26-2-111(1)(D) in the context of this opinion. We have reached our own conclusion that the legislature did not intend to shield a person's property from the lawful claim of alimony and child support. Therefore, the proceeds of Henry Edwards' individual retirement account are subject to Janie Edwards' claim for monthly alimony payments.

Remanded to the trial court for such further proceedings as necessary consistent with this opinion.

/s/ Allen R. Cornelius, Jr.
Special Justice

Concur:
Brock, C.J.
Fones, Cooper, Harbison, JJ.

IN THE SUPREME COURT FOR TENNESSEE
AT NASHVILLE

DAVIDSON LAW

APPEAL NO. 85-20-I

MARRELL WRIGHT EDWARDS, Administratrix, CTA
The Estate of Henry Thomas Edwards, Deceased,

Appellant

vs.

JANIE LEE (STILES) EDWARDS,

Appellee

OPINION ON PETITION TO REHEAR

(Filed July 28, 1986)

A petition to rehear has been filed on behalf of Marrell Wright Edwards, Administratrix. The court has considered fully appellant's argument but find it to be without merit.

The petition to rehear is respectfully denied.

/s/ Allen R. Cornelius, Jr.
Special Justice

Concur:

Brock, CJ.
Fones, Harbison, Cooper. JJ.

IN THE TENNESSEE SUPREME COURT

DAVIDSON LAW

APPEAL NO. 85-20-I

MARRELL WRIGHT EDWARDS, Administratrix CTA, The Estate Of HENRY THOMAS EDWARDS, Deceased,

Appellant,

vs.

JANIE LEE (STILES) EDWARDS,

Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Marrell Wright Edwards, Administratrix, CTA, The Estate of Henry Thomas Edwards, Deceased, hereby appeals to the Supreme Court of the United States from the denial of the Appellant's petition to rehear on July 28, 1986 of the Opinion of the Tennessee Supreme Court entered on June 16, 1986.

This appeal is taken pursuant to 28 U.S.C. § 1257 on the question of whether or not the action of a state court in ordering alimony payments to be paid from Individual Retirement Accounts established under the Employee Retirement Income Security Act violates the Supremacy

Clause of the Constitution of the United States of America.

Respectfully submitted,

TAYLOR, SCHLATER, LASSITER,
TIDWELL & TRENTHAM

BY: /s/ Clark H. Tidwell
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Notice of Appeal has been sent by United States mail to Mr. Lucian Dale, Attorney for Appellee, 162 Fourth Avenue North, Nashville, TN 37219 on this the 1st day of August, 1986.

/s/ Clark H. Tidwell

86-719

No. .....

Supreme Court, U.S.
FILED
OCT 16 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1986

MARRELL WRIGHT EDWARDS,
ADMINISTRATRIX, CTA, THE ESTATE OF
HENRY THOMAS EDWARDS, DECEASED,

Appellant,

vs.

JANIE LEE (STILES) EDWARDS,

Appellee.

ON APPEAL FROM THE TENNESSEE SUPREME COURT

SUPPLEMENTAL APPENDIX TO JURISDICTIONAL STATEMENT

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HENRY THOMAS EDWARDS,
now styled MARRELL WRIGHT
EDWARDS, ADMINISTRATRIX,
C.T.A., THE ESTATE OF
HENRY THOMAS EDWARDS,
DECEASED,

App. No.
84-74-II

Plaintiff/Appellee,

vs.

JANIE LEE (STILES)
EDWARDS,

Defendant/Appellant.

IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

THE HONORABLE WALTER C. KURTZ, JUDGE

FILED: NOV. 15, 1984

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AFFIRMED IN PART; MODIFIED;
AND REMANDED

WILLIAM C. KOCH, JR., JUDGE

HENRY THOMAS EDWARDS,
now styled MARRELL WRIGHT
EDWARDS, ADMINISTRATRIX,
C.T.A., THE ESTATE OF
HENRY THOMAS EDWARDS,
DECEASED,

Plaintiff/Appellee,

App. No.
84-74-II

VS.

JANIE LEE (STILES)
EDWARDS,

Defendant/Appellant.

OPINION

Janie Lee Stiles Edwards, the first wife of Henry T. Edwards, now deceased, is seeking to require that her former husband's estate and his second wife, Marrell Wright Edwards, continue to honor the provision of the couple's amended divorce decree requiring Mr. Edwards to pay Janie Edwards periodic alimony for the rest of her life as long as she remained unmarried. The Fifth Circuit Court for Davidson County, on the record alone without a trial, determined that Mr. Edwards' death was a material change in circumstances warranting a re-examination of the amended divorce decree. Thereupon, the trial court entered an order directing that Mr. Edwards' estate pay Janie Edwards $5,700 consisting of $2,100 for past due alimony not paid at the time of the decision and $3,600 representing monthly alimony payments through January 31, 1985. The trial court further decreed that Janie Edwards' right to receive alimony payments would be extinguished on January 31, 1985. Janie Edwards has perfected this appeal.

We are called upon in this appeal to determine whether a divorced wife whose husband is obligated to pay her alimony for the rest of her life or until she remarries can, upon her, former husband's death, look to funds held jointly by her former husband and his second wife for the satisfaction of his continuing alimony obligations when these funds have been deposited in a joint bank account with a right of survivorship in the second wife.

Based upon the limited facts[1] contained in the record before us, we have determined that the funds contained in a joint bank account of a husband and his second wife can be used to satisfy a continuing obligation to pay alimony to his first wife.

Therefore, for the reasons stated herein, we modify the judgment of the trial court and remand the case for further proceedings.

Janie Edwards, now over 70 years of age, obtained a divorce from Henry T. Edwards, her husband for thirty-eight years, on October 30, 1974. The final decree awarding Mrs. Edwards a divorce based upon cruel and inhuman treatment incorporated the following provision with regard to the payment of alimony *in futuro:*

> 8. It is further agreed between the parties that the Wife shall receive from the Husband, as continuing alimony, $400.00 per month and that said payment shall be made by the Husband on a monthly basis,

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[1] The record before us consists of the pleadings and certain limited discovery documents which contain no detailed information concerning the precise terms of the bank accounts maintained by Mr. Edwards and his second wife or detailed information concerning the manner in which the couple held their real property.

> and shall be paid on the first day of every month after the entry of the final divorce decree herein, and said payment shall continue on the first of every month for as long as the Wife lives or until she remarries, and, in that event, the alimony payments shall cease. Provided that the parties further agree that the matter of alimony remains before the Court for an equitable amount to be set in the event changes in circumstances occur.

On October 20, 1974, Mr. Edwards married Marrell Wright Edwards, now 69 years of age. It was the second marriage for both of them. Mrs. Marrell Edwards possessed a separate estate when she married Mr. Edwards.

On March 10, 1980, Mr. Edwards petitioned for a decrease in his alimony payments based upon the decrease in his income caused by his retirement. Mrs. Janie Edwards contested this request and demanded an increase in alimony because of the increases in her cost of living. On November 7, 1980, the trial court entered an order decreasing Mr. Edwards' monthly alimony obligation from $400 per month to $300 per month. This order also specifically provided:

> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that either party retains the right to come into Court upon a substantial financial change in circumstances in order to modify the decree of alimony as heretofore ordered by the Court.

On December 28, 1981, Mr. Edwards and his wife, Marrell, sold a cottage they owned in Wilson County for

$56,500.[2] After paying the mortgage on the property, they took back a purchase money mortgage on the home which yielded income of $440.44 each month.

On January 1, 1982, Mr. Edwards sold his stock in the company where he was formerly employed and received $63,833.10. He retained this stock as a result of the property settlement in the divorce of his first wife.

On September 23, 1982, Mr. Edwards and his wife, Marrell, purchased certain real property located in Vero Beach, Florida for $58,768 in cash from their joint funds.

Mr. Edwards died testate[3] on June 9, 1983, in Ft. Pierce, Florida. His widow, Marrell Edwards, was named executrix of his estate. In addition to their home in Williamson County and the property located in Vero Beach, Florida, the couple's joint assets included four joint bank accounts totaling $67,565.50, an individual retirement account in Mr. Edwards' name in the amount of $108,260.15, and certain other items of personal property. This property as well as other jointly held assets went to his widow by operation of law and were not listed as part of his estate.

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[2] Mr. Edwards received this property as a result of the property settlement incorporated in the divorce decree entered on October 30, 1974. In consideration for Marrell Edwards' agreement to become obligated on an $18,000 loan to pay off a portion of his divorce settlement, Mr. Edwards conveyed Marrell Edwards an undivided half interest in this property.

[3] Mr. Edwards had executed a will on May 2, 1980. It contained provisions for establishing a marital deduction trust as well as a residual trust naming his wife, Marrell, as the beneficiary. At the oral argument of this case on September 5, 1984, counsel for Marrell Edwards stated, without contradiction, that these trusts were never established.

At the time of his death, Mr. Edwards owned in his own name certain stock in Mid-South Investments, Inc. valued at $16,323.52 that he had received in the property settlement with his first wife. Including this stock, Mr. Edwards possessed $22,323.52 worth of assets in his own name. As of December 29, 1983, his estate had incurred $16,934.55 in expenses relating to his death.

Upon Mr. Edwards' death, Mrs. Marrell Edwards received all the real and personal property they held jointly and as tenants by the entireties. As a result, her income, including Social Security payments resulting from her husband's death, approximates $2,500 per month.[4]

On the other hand, the record shows that Mrs. Janie Edwards' income in 1982 was $4,913.28 of which $3,600 represented alimony payments by Mr. Edwards during 1982. The record is not clear concerning the amount of Mrs. Janie Edwards' income following Mr. Edwards' death.[5] However, this record clearly supports the conclusion that her income remains very modest and is barely able to provide her with minimally adequate support.

Mrs. Janie Edwards received her last alimony payment in June, 1983. On November 14, 1983 (and again on November 18, 1983, and November 23, 1983), Mrs. Janie

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[4] This monthly income is comprised of $440.44 per month in payments from the purchase money mortgage resulting from the 1981 sale of the Wilson County Cottage; $1,335 per month from Mr. Edwards' IRA; and $755 in Social Security payments.

[5] While it may be assumed that her income would decrease if the alimony payments were discontinued, there is no proof in the record concerning the amount of social security benefits Mrs. Janie Edwards is entitled to receive pursuant to 20 C.F.R. § 404.336 (1984) which enables a surviving divorced spouse to receive widow's benefits.

Edwards filed a motion to substitute Mrs. Marrell Edwards, the administratrix of her husband's estate, as the cross-defendant in the original divorce action and to receive the divorce action for further proceedings. An order granting this motion was entered on December 2, 1983.

On December 13, 1983, Mrs. Janie Edwards filed a petition to increase the amount of her alimony *in futuro* to $400 per month for the rest of her life and to reduce to judgment the current arrearage in alimony payments that had not been made since June, 1983. Mrs. Janie Edwards alleged that while her former husband's estate did not contain sufficient funds to discharge this obligation, Mrs. Marrell Edwards should be required to do so from property held jointly with her husband at the time of his death because Mr. Edwards had made conveyances to Marrell Edwards in violation of Tenn. Code Ann. § 66-3-301 *et seq.* which had the effect of defeating his continuing obligation to pay alimony to Mrs. Janie Edwards for the rest of her life or until she remarried.

On December 15, 1983, Mrs. Marrell Edwards moved to terminate alimony payments to Mrs. Janie Edwards based upon the material change in circumstances caused by her husband's death.

The trial court considered these motions on the record and on February 14, 1984, entered an order

(1) finding that Mr. Edwards' death was a material change in circumstance warranting a reconsideration of the amended alimony *in futuro* award to Mrs. Janie Edwards;

(2) finding that Mr. Edwards had not made any fraudulent conveyances to his wife, Marrell, for the

purpose of defeating his alimony *in futuro* obligations;

(3) denying Mrs. Janie Edwards' request that her alimony be increased to $400 per month;

(4) finding that Mrs. Janie Edwards was entitled to the payment of alimony at the rate of $300 per month from July 1, 1983 through January 31, 1984;

(5) finding that Mrs. Janie Edwards was entitled to continue to receive alimony in the amount of $300 per month from February 1, 1984 through January 31, 1985, at which time any further obligation to pay alimony to Mrs. Janie Edwards would cease; and

(6) making provision for attorneys fees.

Mrs. Janie Edwards has perfected this appeal raising two issues:[6] first, that during his lifetime Mr. Edwards made fraudulent conveyances having the effect of defeating her claim to alimony *in futuro* for the rest of her life and second, that she was entitled to an increase in her alimony payment.

I.

Mr. Edwards' Continuing Alimony Obligation

Alimony is an allowance for the sustenance of a spouse following a divorce. *White v. Bates*, 89 Tenn. 570,

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[6] Mrs. Janie Edwards' brief refers erroneously to certain "Assignment of Error." Tenn.R.App.P. 3(h) provides: "Assignments of error are abolished." Tenn.R.App.P. 27(a)(4) now provides that the appellate court will be informed of the issues presented on appeal through the brief filed by the appellant. Pursuant to our authority under Tenn.R.App.P. 2, we are treating Mrs. Janie Edwards' "assignment of error" as the issues she desires this Court to consider.

572, 15 S.W. 651, 652 (1891) and *Livingston v. Livingston,* 58 Tenn.App. 271, 282, 429 S.W.2d 452, 457 (1967). It is based upon a husband's obligation to continue to support his former spouse. *Rush v. Rush,* 33 Tenn.App. 496, 503, 232 S.W.2d 333, 336 (1949).

While there is no mathematical formula that can be used to determine the proper amount of alimony, *Walker v. Walker,* 656 S.W.2d 11, 14 (Tenn.App. 1983), our courts, guided by the criteria contained in Tenn. Code Ann. § 36-5-101(d), generally look to the need of the former spouse as well as the obligor-spouse's ability to pay. *Fisher v. Fisher,* 648 S.W.2d 244, 246-47 (Tenn. 1983) and *Aleshire v. Aleshire,* 642 S.W.2d 729, 733 (Tenn.App. 1981), *aff'd Aleshire v. Aleshire,* Tenn. (Filed at Nashville, Nov. 22, 1982).

Traditionally, our courts ruled that a husband's obligation to pay alimony ends at his death. *Brandon v. Brandon,* 175 Tenn. 463, 465, 135 S.W.2d 929, 930 (1940). However, more recently there has been a recognition that a husband can bind his estate to continue to pay alimony after his death as long as there is clear proof of his intent to do so. *Bringhurst v. Tual,* 598 S.W.2d 620, 621 (Tenn. App. 1980). See also *Smith v. Phelps,* 218 Tenn. 369, 374-75, 403 S.W.2d 747, 749 (1966) and *In re Moore's Estate,* 34 Tenn.App. 131, 148, 234 S.W.2d 847, 854 (1949).[7]

We need not address the question of whether Mr. Edwards intended that his obligation to pay Mrs. Janie

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[7] There is a difference of opinion concerning the standard of evidence necessary to prove a clear intention that an obligation to pay alimony continue after the husband's death. See 24 Am.Jur.2d *Divorce & Separation* § 676 (1983); 27A C.J.S. *Divorce* § 240(b) (1959); Annot., 39 A.L.R.2d 1406 (1955).

Edwards alimony would continue after his death. Both parties have conceded that this was his intention, and so we need not look behind this agreement. For the purposes of this opinion, we construe the language contained in the divorce decree entered on October 30, 1974, as creating an obligation to pay alimony that can continue after Mr. Edwards' death.

II.

Mr. Edwards' Death As A Changed Circumstance

However, even though we have determined that Mr. Edwards' obligation to pay alimony lives on after his death, it is clear that the trial court has the authority, upon a proper showing, to re-examine the alimony award and to make adjustments dictated by material changes in the circumstances. *Perry v. Perry*, 183 Tenn. 362, 364, 192 S.W.2d 830, 830-31 (1946) and *Jones v. Jones*, 659 S.W.2d 23, 24 (Tenn.App. 1983). See also Tenn Code Ann. § 36-5-101(a)(1).

Both parties agreed[8] and the trial court found that Mr. Edwards' death was a changed circumstance warranting a re-examination of the amended alimony award to Mrs. Janie Edwards. We agree that the death of an obligor-spouse is a changed circumstance that warrants a re-examination of an award for periodic alimony. See *First National Bank in St. Petersburg v. Ford*, 283 So.2d 342, 345 (Fla. 1973) and *Van Haltern v. Van Haltern*, 352 Mich. 286, 88 N.W.2d 485, 487 (1958). The payment of

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[8] The parties during argument, however, took differing views on how this change of circumstances affected Mrs. Janie Edwards' continuing need for alimony.

alimony, among other things, is a function of the spouse's ability to pay as well as each parties' separate assets. *Aleshire v. Aleshire,* 642 S.W.2d 729, 733 (Tenn.App. 1981), *aff'd Aleshire v. Aleshire,* Tenn. (Filed at Nashville, Nov. 22, 1982), and Tenn. Code Ann. § 38-5-101(d)(1) & (6). Death will, of necessity, have a direct and final bearing upon the deceased spouse's earning capacity, ability to pay, and the status of any separate assets which, on death, become the property of others through devise or otherwise.

III.

The Application of Tenn. Code Ann § 66-3-301 et seq.

Mrs. Janie Edwards contends that certain of the financial dealings between Mr. Edwards and his second wife placed his assets beyond the reach of her claims for alimony and were, therefore, fraudulent conveyances in violation of Tennessee's version of the Uniform Fraudulent Conveyance Act, Tenn. Code Ann. § 66-3-301 *et seq.* There is no question that Mrs. Janie Edwards is a creditor for the purposes of our fraudulent conveyance laws because she is a former wife seeking alimony payments that have been ordered judicially. *Wilhoit v. Castell,* 62 Tenn. 419, 423 (1874); *Boils v. Boils,* 41 Tenn. (1 Cold.) 284, 287-88 (1860); and *Taylor v. Taylor,* 6 Tenn.Civ.App. 268, 273 (1915).

Without providing this Court with a detailed discussion concerning why these transactions should be considered fraudulent conveyances, counsel for Mrs. Janie Edwards, in his brief, points to the following transactions involving Mr. Edwards and his second wife as ones which adversely affect her:

(a) the 1981 sale of the cottage located in Wilson County that Mr. Edwards received in the 1974 property settlement with his first wife;

(b) the 1980 sale of TVESCO stock Mr. Edwards received in the 1974 property settlement with his first wife;

(c) the proceeds from Mr. Edwards' IRA at First American National Bank that Mrs. Marrell Edwards is receiving because she is Mr. Edwards' surviving spouse; and

(d) Mr. Edwards' maintenance with his second wife of four joint bank accounts containing $67,563.65.

While conveyances between a husband and wife are not inherently fraudulent, they should be closely scrutinized because they awaken suspicion and can give greater weight to other existing unfavorable circumstances that may cause a transaction to be found in violation of Tenn. Code Ann. § 66-3-301 *et seq.* *Robinson v. Frankel*, 85 Tenn. 475, 478, 3 S.W. 652, 653 (1887); *Union Bank v. Chaffin*, 24 Tenn.App. 528, 534, 147 S.W.2d 414, 418 (1940); and *Farmers Bank of Lynchburg v. Farrar*, 4 Tenn.App. 186, 192 (1926).

Tenn. Code Ann. § 66-3-305 provides:

> Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual interest, if the conveyance is made or the obligation is incurred without a fair consideration.

In order for a conveyance to be found fraudulent under this section, it is necessary to show only that the transfer was made "without fair consideration" and that as a result of the conveyance the debtor "will be thereby ren-

dered insolvent," *Hicks v. Whiting*, 149 Tenn. 411, 444, 258 S.W. 784, 794 (1924) and *Ottarson v. Dobson & Johnson, Inc.*, 58 Tenn.App. 408, 419-20, 430 S.W.2d 873, 877-78 (1968). No proof of actual intent to defraud is required if these two elements have been proved. *Marsh v. Galbraith*, 31 Tenn.App. 482, 486-87, 216 S.W.2d 968, 970 (1948) and *Scarborough v. Pickens*, 26 Tenn.App. 213, 219, 170 S.W.2d 585, 587 (1942).

At the outset, we conclude that neither Mr. Edwards' sale of his TVESCO stock in 1980, nor the sale of the Wilson County cottage in 1981, nor Mrs. Marrell Edwards' receipt of the proceeds from Mr. Edwards' IRA account in 1983 are fraudulent conveyances within the meaning of Tenn. Code Ann. § 66-3-305. In each instance, adequate consideration was given, and none of the transactions left Mr. Edwards insolvent at the time they were made or rendered his estate unable to meet his obligations upon his death.

The same, however, cannot be said for the four joint bank accounts containing $67,565.65. Whether these funds were held by Mr. Edwards and his second wife as joint tenants with a right of survivorship or as tenants by the entirety,[9] the passage of the funds in these accounts to Mrs. Marrell Edwards upon her husband's death can be set aside if the claims of creditors are thereby defeated. *Griffin v. Prince*, 632 S.W.2d 532, 537 (Tenn. 1982). See

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[9] The ownership interest of the Edwards in these accounts depends upon the contractual agreements with the financial institutions involved. *Griffin v. Prince*, 632 S.W.2d 532, 534-35 (Tenn. 1982) and *Lowry v. Lowry*, 541 S.W.2d 128, 131-32 (Tenn. 1976). There is no proof in the record concerning these contractual agreements.

also *United States v. Kerr*, 470 F.Supp. 278, 281 (E.D. Tenn. 1978) and *Corbett v. Hunter*, 292 Pa. Super. 123, 436 A.2d 1036, 1037-38 (1981).

These accounts were not fraudulent conveyances when they were established because they did not render Mr. Edwards insolvent nor is there any proof that the consideration was inadequate. The funds contained in these accounts are comingled assets originally belonging to Mr. Edwards and his second wife separately. During Mr. Edwards' lifetime, there is no question that he could have used these funds to meet his alimony obligations to his first wife without permission of his second wife. However, it is the gratuitous transfer of these funds to Mrs. Marrell Edwards upon Mr. Edwards' death that runs afoul of Tenn. Code Ann. § 66-3-305. Were it not for the operation of Mrs. Marrell Edwards' survivorship rights, these funds would continue to be available to satisfy Mrs. Janie Edwards' alimony claims. There was no new consideration given for the operation of these rights of survivorship, and as a result of their operation, Mr. Edwards' estate was rendered unable to meet his continuing alimony obligations to his first wife.

The Court of Appeals of New York faced a similar situation in a case wherein the decedent's son sought to obtain unpaid child support payments from his father's second wife who was acting as executrix of her husband's estate. At issue were certain mutual funds that had been held by the decedent and his second wife as joint tenants with rights of survivorship. The New York Court of Appeals found that the operation of the decedent's second wife's survivorship interest amounted to a fraudulent con-

veyance thereby rendering the jointly held assets available to satisfy the claims of the decedent's son. *In re Granwell,* 20 N.Y.2d 91, 228 N.E.2d 779, 782-83 (1967). See also *Rupp v. Kahn,* 246 Cal.App.2d 188, 55 Cal.Rptr. 108, 112-113 (1966).

Based upon the foregoing, we conclude that the $67,565.65 in the four joint bank accounts is available to the Court in determining what disposition should be made of Mrs. Janie Edwards' request for alimony following her former husband's death.

IV.

Statutory Availability of Funds in Joint Bank Accounts

The Legislature has provided another basis to find that the funds held in the joint bank accounts of Mr. Edwards and his second wife were available to Mrs. Janie Edwards.

In *Griffin v. Prince,* 632 S.W.2d 532 (Tenn. 1982), the Tennessee Supreme Court held that a creditor of a husband could not garnish funds in a bank account owned jointly by the husband and his wife. In response to this decision, the Legislature passed Chapter 110, Public Acts of 1983 which amended Tenn. Code Ann. § 45-2-703(a) pertaining to bank deposits in two or more names. As amended, this section now provides, in part, that

> Any balance so created shall be subject to assignment by, or the claim of any creditor of, either depositor, as if such depositor were the sole owner of the funds; provided, however, that if such creditor realizes its claim, by garnishment, set off, or otherwise, any other depositor may, by appropriate action against the creditor, establish such rights as that depositor may have in the funds.

The effect of this legislation is to strip bank accounts held by married persons as tenants by the entirety of all the incidents of ownership usually attached to such tenancy. Thus, the funds in joint bank accounts of married persons have become available to satisfy the claims of creditors of one of the spouses.

We have already determined that Mrs. Janie Edwards is a creditor of her former husband. Therefore, Tenn. Code Ann. § 45-2-703(a) provides her with a means of access to the bank accounts maintained by Mr. Edwards and his second wife.

V.

Alimony Award to Mrs. Janie Edwards

Having determined that the funds in the joint bank accounts of Mr. Edwards and his second wife are available for use to satisfy Mrs. Janie Edwards' continuing expectation of alimony, we now consider whether the amended periodic alimony award of $300 per month should be modified as a result of Mr. Edwards' death. We think that it should.

While Mr. Edwards' death has a direct effect upon his ability to pay alimony, it has no effect upon Mrs. Janie Edwards' need for continuing support. She is seventy years of age, and it would not be reasonable to expect that she can be gainfully employed to aid in her support. Prior to her former husband's death, her annual income was $4,913.28. This consisted of $3,600 in alimony payments as well as $1,313.28 in interest from funds she received in the 1974 property settlement accompaning her divorce from Mr. Edwards. No more is required to find that Mrs. Janie Edwards is in need of continuing sustenance.

However, we do not think that Mrs. Janie Edwards should continue to receive periodic alimony payments for the rest of her life. This would require Mrs. Janie Edwards and Mrs. Marrell Edwards to maintain a continuing relationship which would be a source of discomfort to both. It would also be the source of continuing friction between the parties were there future requests to alter the amount of alimony or were the assets being used to meet this alimony obligation depleted. When faced with similar situations, other courts have determined that an alimony *in futuro* award should be modified to an alimony *in solido* award upon the death of the obligor-spouse. See *First National Bank in St. Petersburg v. Ford,* 283 So.2d 342, 345 (Fla. 1973) and *Van Haltern v. Van Haltern,* 351 Mich. 286, 88 N.W.2d 485, 487 (1958). Likewise, we find that Mrs. Janie Edwards should receive an alimony *in solido* award to be paid from the funds available in Mr. Edwards' separate estate and from the funds in the joint bank accounts owned by Mr. Edwards and his second wife at the time of his death. Such an award will precisely identify Mrs. Janie Edwards' right and will finally resolve this matter between the parties.

We have determined, as the trial court did, that there is no basis to alter the monthly rate at which Mrs. Janie Edwards' alimony has been accruing. Thus, we affirm the trial court's determination that Mrs. Janie Edwards should receive $2,100 for past due alimony.

Mrs. Janie Edwards' normal life expectancy at this time is approximately thirteen years. Were she to continue to receive $300 per month for this period, she would receive a total of $46,800. However, the present value of

this award compounded at ten per cent interest[10] would be approximately $36,000. Therefore, in recognition of Mrs. Janie Edwards' precarious financial situation, the trial court's award of alimony to Mrs. Janie Edwards is modified to provide that she be awarded $38,100 to be paid from the funds remaining in Mr. Edwards' separate estate and from the funds remaining in Mr. Edwards' bank accounts at the time of his death.

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[10] Tenn. Code Ann. § 47-14-121 sets a ten percent (10%) per annum rate for use on post-judgment awards.

IN THE FIFTH CIRCUIT COURT
FOR DAVIDSON COUNTY, TENNESSEE

JAMIE LEE STILES
EDWARDS,

Plaintiff,

vs. NO. 72095

MARRELL WRIGHT
EDWARDS,
Administratrix, C.T.A.,

Defendant.

ORDER

This cause came on to be heard before the Honorable Walter Kurtz, Judge of the Fifth Circuit Court, upon Motion of Marrell Wright Edwards, Administratrix, C.T.A. of the Estate of Henry Thomas Edwards ("Defendant"), to terminate future alimony payments to Janie Lee Stiles Edwards ("Plaintiff"), the Petition by Plaintiff to reinstate and increase alimony and reduce the arrearage to judgment, Interrogatories and Affidavits of record, statements of counsel, Briefs submitted by the parties and the entire record, from all of which the Court finds:

1. That Plaintiff is entitled to arrearage at the rate of Three Hundred ($300.00) Dollars per month from July 1, 1983 through January 31, 1984;

2. That Plaintiff is entitled to continuation of alimony in the amount of Three Hundred ($300.00) Dollars per month from February 1, 1984 through January 31, 1985;

3. That Plaintiff is not entitled to an increase in alimony from Three Hundred ($300.00) Dollars to Four Hundred ($400.00) Dollars per month;

4. That Defendant has experienced such a change of circumstances as to justify a termination of alimony;

5. That Defendant did not transfer assets in violation of Tennessee Code Annotated Section 66-3-301 through Section 66-3-314, the Uniform Fraudaulent Conveyance Act;

6. That counsel for Plaintiff is entitled to a reasonable attorney's fee for professional services rendered in this matter.

It is therefore ORDERED, ADJUDGED and DECREED that Plaintiff have and recover from the Defendant the amount of Five Thousand Seven Hundred ($5,700.00) Dollars as a claim against the Estate of Henry Thomas Edwards, deceased, of which amount Two Thousand One Hundred ($2,100.00) Dollars is currently due and owing and Three Thousand Six Hundred ($3,600.00) Dollars is due and payable at the rate of Three Hundred ($300.00) Dollars per month beginning February 1, 1984.

It is further ORDERED, ADJUDGED and DECREED that Lucien Dale, counsel for Plaintiff, is entitled to $..... as compensation for professional services rendered in this cause as a further claim against the said Estate.

Enter this the ..... day of ....., 1984.

.....

JUDGE

APPROVED FOR ENTRY:

/s/ Clark H. Tidwell
Attorney for Marrell Wright Edwards,
Administratrix, C.T.A. of the Estate
of Henry Thomas Edwards
24th Floor, L & C Tower
Nashville, Tennessee 37219

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Order has been sent to Mr. Lucien Dale, Attorney for Janie Lee Stiles Edwards, Suite 205, Ambrose Building, 162 Fourth Avenue North, P.O. Box 2868, Nashville, Tennessee 37219 on this the 7th day of February, 1984.

/s/ Clark H. Tidwell